Supreme Court, U.S.
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No. OFFICE OF THE CLERK
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In The
SUPREME COURT OF THE UNITED STATES

LARRY GREEN,
Petitioner

v.

FIDELITY INVESTMENTS,
Respondent

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's decision in *Gross v. FBI Fin. Services, Inc.*, 129 S.Ct 2343 (2009), does the plaintiff now need to show that age was the "but for" cause of the adverse decision in order to establish a prima facie case?

2. Does the three-part evidentiary framework set forth *in McDonnell Douglas v. Green*, 411 U.S. 792 (1973) apply to claims brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*?

PARTIES TO THE PROCEEDING

The parties to this case are Petitioner Larry Green and Respondent Fidelity Investments.

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OPINIONS BELOW

The decision of the Sixth Circuit issued March 15, 2010 is set forth in the Appendix at page 1a. The May 25, 2010 Order denying Petitioner's petition for rehearing is set forth in the Appendix at page 16a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on March 15, 2010. A timely petition for rehearing was denied on May 25, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides that:

"It shall be unlawful for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . ."

STATEMENT OF THE CASE

Petitioner Larry Green (Plaintiff) was 52 years-old when Dina Rulli, his 32 year-old supervisor, fired him. Rulli said Plaintiff took credit for a lead that he did not deserve. Plaintiff denied any inappropriate conduct.

Plaintiff was not replaced by a younger employee and there was no similarly situated employee who engaged in the same alleged misconduct. However, there was substantial evidence showing that Rulli's decision was motivated by age bias. Rulli liked and favored her younger subordinates but treated the older employees adversely. Rulli seized upon a disputed event to justify Plaintiff's dismissal.

The Sixth Circuit held that Plaintiff could not make out a prime case of age discrimination because there was no evidence suggesting that his age was the "but for cause" of the termination. However, in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), this Court held a plaintiff need only present evidence that is "adequate" to create an inference of discrimination. There is no requirement that an employee meet the ultimate burden of proof at the prima facie stage of the case.

Plaintiff seeks review of the panel's erroneous opinion to allow the Court to address two broader questions: First, in light of the Court's

decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct 2343 (2009), does the evidentiary framework set forth in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973) apply to claims under the ADEA? Second, if *McDonnell Douglas* applies, did the Court in *Gross* establish new and heightened standard to measure whether a prima facie case has been established?

A. Facts

Plaintiff began his employment with Fidelity in September of 1999. (RE No. 33, Green depo. at 47). He worked in various customer service and sales roles. He was licensed to sell securities and other investment products.

In May of 2005, Plaintiff transferred to the Investments Team supervised by 32 year-old Dina Rulli. (RE 33, Green depo. at 115-16; RE 34, Rulli depo. at 6). Plaintiff went Rulli's team because he wanted to work the Sunday to Wednesday shift. Rulli had no control over who joined her team or Plaintiff's transfer. (RE 34 at 48-49, 53, 181-82).

Plaintiff was a top performer on Rulli's team. He won sales contests and received multiple customer service awards. In late 2005, Plaintiff's teammates voted him the "Team All Star." (RE 34 at 100). In February of 2006, Plaintiff received the highest bonus payout available for the previous quarter. (RE No. 39, Green Declaration, ¶ 3).

By March of 2006, Rulli had listened to between 75 and 100 of Plaintiff's calls. (RE 34 at 102). She admitted that before then, she never heard anything that caused her to believe that Plaintiff was improperly claiming leads. (Id. at 102, 119).

In March of 2006, Rulli attended a managers' meeting where one of Plaintiff's customer calls was played. (RE 34 at 111). A question was raised regarding whether Plaintiff took credit for a lead without asking the customer all of the required questions. (Id. at 112-114).

Rulli met with Plaintiff and played a portion of the call in question. (RE 33 at 215). Plaintiff acknowledged that he claimed a lead, but did not recall the circumstances. Once Plaintiff had the chance to review his notes, Plaintiff recalled that he had used the lead process to notify the Income Planning Department that it needed to follow-up with the existing client. (Id. at 219-226). Plaintiff had been advised by a person in the Income Planning Department that sending a lead was the best way to notify them that action was needed. (Id.). Plaintiff told Rulli that she could delete the lead from his total. (Id. at 227, 235). He had no incentive to falsify the lead or take credit for it. He had all the leads he needed. (Id. at 226-27, 236, 281). Plaintiff was simply trying to do what was in the best interests of the client and Fidelity. (Id. at 230-31).

Despite never previously hearing anything in Plaintiff's calls that gave rise to any concerns about his leads, Rulli claimed that she listened to additional recorded conversations between Plaintiff and customers. (RE 34 at 126-27). According to Rulli, Plaintiff improperly took credit for several other recent leads. Rulli never allowed Plaintiff to hear the additional calls and never gave him the opportunity to explain his conduct. (RE 33 at 239, 242-43; RE No. 34 at 142-43).

Rulli acknowledged that she had discretion to decide whether Plaintiff would be terminated. (RE 34 at 177). Rulli had never disciplined Plaintiff in the past. (RE 34 at 101). Still, she chose the harshest action available and fired Plaintiff.

Within two days of his dismissal, Plaintiff complained to Fidelity's Human Resources Department that Rulli fired him because he was "not 25 years-old and didn't wear tight pants." (RE 34, Ex. 9). Plaintiff's assertion of age discrimination was well-founded and fully supported by the evidence. While Rulli did not make any comments showing her dislike for older employees, it was evident in her actions. The record below was full of facts, many of them undisputed, from which jurors could have concluded that Rulli harbored age bias.

For example, Plaintiff testified that young Rulli played to the younger employees and tried to be like them. (RE 33 at 151). Rulli's department was arranged so that younger employees were situated closer to her. (RE 30 at 12).

Plaintiff observed that younger employees were taken to a coaching room with Rulli, but that older employees were not receiving her assistance, coaching or answers to their questions. (RE 33 at 166, 178-79). Rulli was far more interested in the younger employees.

Rulli nominated a young subordinate and team-member, Nate Parkhouse, for two prominent discretionary awards that he arguably did not deserve. (RE 33 at 97,152, 159-60).

While Rulli showed a penchant for favoring younger employees, she treated older employees adversely.

When 48 year-old Debbie Collins asked Rulli to sit next to her so Rulli could listen to some of her calls and help Collins do a better job, Rulli refused. Instead, a younger employee sat next to Rulli. (RE 39 at ¶¶ 8-9).

60 year-old Bill Harland, another protected-age employee on Rulli's team, testified that Rulli did not want to be around older employees. (RE No. 30, Harland depo. at 6, 12).

In February of 2006, Rulli fired Debbie Collins after Collins used a client's password, at the client's request, to access information about his account. (RE 39, ¶ 9). As noted above, Collins was 48. She was not aware of any policy that prohibited her from using the client's password with the

client's consent. Collins thought she was providing good customer service. (Id).

Rulli had also disciplined 46 year-old Tamara O'Brien and had threatened her with termination. (RE 33 at 272; RE 34 at 91). O'Brien was a veteran who did well before Rulli became her manager. (RE 32 at 16, 21).

In her short time over the Investments Team, Rulli fired two employees over the age of 40 – Collins and Plaintiff – and had threatened a third, Tamara O'Brien, with dismissal.[1]

B. The Decisions Below

Following his termination, Plaintiff filed suit in the United States District Court for the Southern District of Ohio. He alleged, among other things, a claim for discrimination in violation of the ADEA. The district court granted summary judgment. Plaintiff appealed.

On March 15, 2010, a panel of the Sixth Circuit affirmed the district court's decision. The panel held that Plaintiff could not establish a prima facie case. (Panel Decision, Appendix at 11a-12a). The panel resisted Plaintiff's attempt to meet his initial burden through an array of circumstantial evidence including favoritism toward younger employees and adverse treatment

[1] It was undisputed that Rulli did not terminate any employees under the age of 40. (RE 34 at 110).

of older team members. The panel cited Sixth Circuit precedent requiring proof of replacement by an employee outside the protected age group or favored treatment of a similarly situated employee outside the protected group. (Panel Decision, Appendix at 11a-12a). The panel stated that even if it applied a more forgiving prima facie standard that, Plaintiff did not present evidence suggesting that age was the "but for" cause of his termination. (*Id.* at 12a).

Plaintiff sought rehearing. His petition was denied on May 25, 2010. (Order, Appendix at 17a).

REASONS FOR GRANTING THE WRIT

As set forth more fully below, this case provides a vehicle for the Court to address and clarify several important and timely issues regarding the nature and amount of proof required to establish a prima facie case under the ADEA.

First, this case allows the Court to answer questions that have arisen in the wake of *Gross*. For example, if the *McDonnell Douglas* framework remains applicable, does *Gross* affect the amount of proof needed to establish a prima facie case under the ADEA? Must a plaintiff, as the Sixth Circuit suggests, now present enough evidence at the prima facie stage to show that age was the "but for" cause of the adverse action?

Second, this case provides the opportunity to clarify the nature and amount of proof that is sufficient to establish a prima facie case of age discrimination. While this Court held in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996) that a plaintiff need only present evidence that is "adequate" to create an inference of discrimination, the Sixth Circuit stated that a plaintiff must show, among other things, that he or she "was replaced by someone outside the protected class or treated differently from a similarly-situated employee outside the protected class." (Panel Decision, Appendix at page 10a).

The Court should correct the Sixth Circuit's erroneous statement of the law. Age discrimination can occur without a replacement. A boss motivated by age bias can simply get rid of an older employee and seek no replacement. This is especially true where as here, the function is accomplished by a "team" of employees taking random incoming calls and employees join the team based on their desire for a particular shift. Age discrimination can also occur even in the absence of a younger comparator. A boss who is looking to terminate an older employee can use the first indiscretion as the pretext to hide an illegal motive. The lack of a similarly situated younger employee does not negate the pre-existing discriminatory animus.

Finally, this case presents the Court with the opportunity to decide a question it has repeatedly asked but never answered: Does the evidentiary framework set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) apply to the ADEA? In light of the decision in *Gross* and resulting uncertainty present in the lower courts, this is a question best answered now.

A. The Court Should Clarify Whether A Prima Facie Case Under The ADEA Now Requires A Showing That The Adverse Action Would Not Have Been Taken "But For" The Employee's Age

In *Gross*, the Court held that, unlike mixed motive claims under Title VII, the burden of proof in a case brought under the ADEA never shifts to the employer. 129 S.Ct at 2352. The Court also held that as used in the ADEA, the term "because of" means that age must have been the "but for" cause of the decision; showing that age was one motivating factor is not enough. *Id.*

The Sixth Circuit held that Plaintiff failed to establish a prima facie case. The panel stated that it saw no need to apply a more flexible standard than *McDonnell Douglas*, and that even if it did, Plaintiff would still not be able to show that age was the "but for" cause of his termination. (Appendix at 11a-12a). The court made its determination in the context of the prima facie

case. It did not reach the issue of pretext. (Appendix at 12a, n.4).

In *Gross*, the question of whether the plaintiff established a prima facie case was not at issue. As a result, the Court did not review address one of the questions presented here: To establish a prima facie case under the ADEA, does the employee need to present evidence suggesting that age was the "but for" cause of the adverse decision?

This Court has long-recognized that "the burden of establishing a prima facie case is . . . not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) and *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 312 (1996), citing *Teamsters v. U.S.*, 431 U.S. 324, (1977). A prima facie case only requires "evidence adequate to create an in inference that an employment action was based on an illegal discriminatory criterion." *O'Connor*, 517 U.S. at 312.[2]

The prima facie case eliminates the common, legitimate reasons for an adverse employment action and creates a legally mandatory

---

[2] It has been stated that the requisite degree of proof "necessary to establish a prima facie case . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). *See also Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987), *cert. denied*, 498 U.S. 939, 111 S.Ct. 345, 112 L.Ed.2d 309 (1990).

rebuttable presumption of discrimination. *Burdine*, 450 U.S. at 254. Once a prima facie case is established, the employer is required to articulate a legitimate non-discriminatory reason for its conduct. *Id.* at 254.

Despite this Court's directives regarding the minimal burden required to present a prima facie case, the Sixth Circuit held Plaintiff to a higher standard. While nominally applying *McDonnell Douglas*, the Sixth Circuit appeared to merge the minimal proof required to establish a prima facie case with the ultimate question of discrimination. The court held that Plaintiff failed to present evidence at the prima facie stage to suggest that age was the "but for" cause of his termination.

In *Bell v. Raytheon Co.*, 2009 WL 2365454 (N.D. Tex. July 31, 2009), the court reached a similar conclusion. After acknowledging that Bell had successfully met the elements of *McDonnell Douglas*, the court granted summary judgment without requiring the employer to even state a reason for dismissal:

> "Although the plaintiffs have stated a prima facie case of age discrimination, the court need not reach stage two because the plaintiffs have not shown by a preponderance of the evidence that age was the but-for cause of Cox's non-selection. The motion for summary judgment on this claim is therefore granted."

Id. at *5.

Requiring an employee to prove that age was the "but for" cause of the adverse action at the prima stage of the case is directly at odds with this Court's precedent. The prima facie case is designed simply to create an "inference" that age could have played a role in the adverse decision. *O'Connor*, supra at 312. On the other hand, the "but for" standard adopted in *Gross* addresses the ultimate issue of discrimination – a question that is answered only after the employer articulates the basis for the adverse action.

In addressing this question, the Court is also presented with the opportunity to confirm that proof of the specific *McDonnell Douglas* elements is not required to establish a *prima facie* case of discrimination. In *Teamsters, supra*, the Court clearly rejected such a rule:

> "The company and union seize upon the *McDonnell Douglas* pattern as the *only* means of establishing a prima facie case of individual discrimination. Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing

factual situations." *Id.*, at 802 n. 13."

Teamsters v. *United States,* 431 U.S. at 358. (emphasis in original). The Court also made it clear that:

> "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act "

Id.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court reiterated that "the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Id.* at 512 *citing Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The degree of flexibility in establishing a prima facie case was aptly stated by the Seventh Circuit in *Carson v. Bethlehem Steel Corp.* 82 F.3d 157 (7th Cir. 1996):

> "Any demonstration strong enough to support a judgment in the plaintiff's favor if the employer remains silent will do, *even if the proof does not fit into a set of pigeonholes*."

Id. at 159 (emphasis ours).

Despite the foregoing, and despite the fact that Plaintiff made it clear that he was not attempting to establish a prima facie case based on the *McDonnell Douglas* elements, the Sixth Circuit stated that it "routinely affirms the grant of summary judgment for failure to establish a *prima facie* case based on the *McDonnell Douglas* criteria." (Appendix at 11a). The court held that the fact that Plaintiff was not able to meet the *McDonnell Douglas* formula "is not itself sufficient reason to dispense with this test in favor of a more forgiving standard." (*Id.* at 12a).

In fact, Plaintiff did not ask the court to apply "a more forgiving standard." In accordance with this Court's precedent, Plaintiff sought to establish a prima facie case by presenting circumstantial evidence that created an inference he was terminated based on his age. As set forth above, Rulli harbored age bias. It was evident in Rulli's desire to be around and help younger employees, the favoritism she showed for her young contemporaries, and the adverse treatment she directed at Plaintiff, Collins and O'Brien.

B. There Is A Disagreement Among The Circuits Regarding The Nature Of Proof Necessary To Meet The Fourth Prong Of The *McDonnell Douglas* Test

The first three elements of the *McDonnell Douglas* prima facie test tend to eliminate the most obvious legitimate defenses in a discrimination case. Clearly, an employee must be part of the protected class, must generally possess the basic qualifications for the position, and must suffer an adverse action. However, the courts are divided as to the nature and type of evidence sufficient to satisfy the fourth element.

In *Rivera Aponte v. Restaurant Metropol No. 3, Inc.*, 338 F.3d 9 (1st Cir. 2003), the First Circuit held that the fourth element is satisfied when:

> "(4) the employer did not treat age neutrally. *Pages-Cahue v. Iberia Líneas Aéreas de España*, 82 F.3d 533, 536 (1st Cir.1996). The fourth element requires the plaintiff to produce "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (quotation omitted)."

The Second Circuit has set forth an equally

broad test. An employee can satisfy the fourth prong by showing that the adverse employment action "*occurred under circumstances giving rise to an inference of discriminatory intent.*" *Terry v. Ashcroft*, 336 F.3d 128, 138 (2nd Cir. 2003)(emphasis ours).

The Seventh Circuit has stated that the an employee can meet fourth element of *McDonnell Douglas* by demonstrating that the employer replaced him with someone substantially younger or that there is "*other such evidence that indicates that it is more likely than not that his age . . .was the reason for the adverse employment action.*" *Robin v. Espo Engineering Corp.*, 200 F.3d 108, 1090 (7th Cir. 2000) (emphasis ours).

Unlike the flexible language and standards set forth above, the Sixth Circuit stated that to set forth a prima facie case, "a plaintiff must establish that he or she was: 1) a member of the protected class (i.e., at least forty years old); 2) subject to adverse employment action; 3) qualified for the position; and 4) replaced by someone outside the protected class or treated differently from a similarly-situated employee outside the protected class." (Panel Decision, Appendix at page 10a, *citing Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009).

The formulation stated by the Sixth Circuit is contrary to this Court's holding in *O'Connor*. There is no requirement under the ADEA that a

replacement or comparator be "outside the protected class."

Clearly, replacement by a substantially younger employee or favored treatment of a substantially younger similarly situated younger employee may be evidence that creates an inference of discrimination. But these factors are not exclusive. The test stated by the Sixth Circuit forecloses a prima facie case even where other circumstantial evidence exists tending to show discriminatory intent.

For example, if the only employees terminated were in the protected class, an inference of discrimination may arise.[3] Favoritism by a young supervisor toward young subordinates in contexts other than disciplinary action, such as training, help, and nominations for discretionary awards, can also create an inference of discrimination. Expressing, by words or conduct, a desire not be around older people can be evidence supporting an inference of discrimination. The fact that a manager exercises discretion in a way that is adverse to older employees on repeated occasions

[3] In *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th Cir. 1988), the two oldest members of a nine-person department were terminated. None of the remaining non-managerial employees was over 33. The court noted this fact was "not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome."

certainly would support an inference of discrimination. Yet, under the test stated by the Sixth Circuit in this case, none of the above types of relevant and probative evidence would be considered.[4]

C. The Court Should Decide Whether The McDonnell Douglas Evidentiary Framework Applies To The ADEA

In *Gross*, the Court noted that it "has not definitively decided whether the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), utilized in Title VII cases is appropriate in the ADEA context." *Gross*, 129 S.Ct. at 2349 n.2. The Court has previously raised the same question, but has never addressed it. *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (assuming that the *McDonnell Douglas* framework applied to an ADEA claim where the issue was not disputed by the parties); and *O'Connor v. Consolidated Coin Caterers*, 517 at 311 (1996)(also assuming that *McDonnell Douglas* applies to age discrimination claims).

The decision in *Gross* has led to uncertainty and confusion. Courts and practitioners who have

[4] The Sixth Circuit's decision would also appear to leave no room to consider a decision-maker's comments about older employees that may show animus but do not rise to the level of direct evidence.

applied the *McDonnell Douglas* test for years face new and unanswered questions.

For example, as noted above, if the prima facie burden-shifting test applies, what amount of evidence is required to establish the prima facie test? Is the plaintiff only required to present evidence "adequate to create an inference that an employment action was based on an illegal discriminatory criterion" as set forth in *O'Connor*? 517 U.S. at 312. Or, as in this case and *Bell v. Raytheon, supra,* must employees now produce evidence at the prima facie stage sufficient to show that age was the "but for" cause of the adverse decision?

If the *McDonnell Douglas* test no longer applies, what is the effect of the Court's decision in *Reeves v. Sanderson Plumbing*? There, the Court held that an ADEA plaintiff could prevail on the strength of the prima facie case and evidence of pretext. 530 U.S. at 148 ("Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."). If the initial prima facie burden is eliminated from the equation, what role, if any, will pretext play, and at what stage of the case?

This case presents an opportunity for the Court to address this important and widely applicable legal question.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

No.

LARRY GREEN,
Petitioner

v.

FIDELITY INVESTMENTS,
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4,017 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1.

I declare under penalty of perjury that the foregoing is true and correct.

s/ David Torchia	8/22/2010
David Torchia	Date

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing document were served by U.S. Mail upon Kelley Schoening, Esq., Dressman, Benzinger, LaVelle, PSC, 207 Thomas More Parkway, Crestview Hills, KY 41017 on August 23, 2010.

s/ David Torchia
David Torchia

APPENDIX

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
File name: 10a0158n.06
No. 09-3247

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
March 15, 2010
LEONARD GREEN, Clerk

LARRY GREEN,	)
	)
Plaintiff-Appellant,	)
	) ON APPEAL FROM
	) THE UNITED
v.	) STATES DISTRICT
	) COURT FOR THE
FIDELITY	) SOUTHERN
INVESTMENTS	) DISTRICT OF OHIO
	)
Defendant-Appellee,	)

BEFORE: MARTIN and WHITE, Circuit Judges; ZOUHARY, District Judge *

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* The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation

HELENE N. WHITE, Circuit Judge. Larry Green appeals from the district court's grant of summary judgment to Fidelity Investments (Fidelity), dismissing Green's claims of age discrimination, breach of contract, defamation, and tortious interference with business relationships. We affirm.

I.

The district court opinion sets forth the relevant facts:

> On September 14, 1999, Plaintiff Larry Green began working for Defendant Fidelity Investments ("Fidelity") as a financial service representative. At that time,Green signed an Employee Agreement acknowledging that his employment was at-will. While employed at Fidelity, Green became licensed by the National Association of Securities Dealers ("NASD").
>
> In May of 2005, Green transferred to Fidelity's Investments Department to work as an Investment Representative ("IR"). As an IR, Green answered calls from current and potential customers to assist them with their financial needs, and refer them to other Fidelity departments.

Green was required to "qualify" potential customers to determine which Fidelity products and services were suitable. To properly qualify a caller, an IR must ask each caller a series of pre-determined questions. When an IR determines that a caller is qualified for a particular product or service, the IR marks a "lead" in the caller's account. A lead identifies the specificproduct or service for which a caller is qualified and may be interested. Based on the type of lead designated, a Fidelity business partner who specializes in that product or service will then contact the caller to provide additional information and attempt to complete the transaction. IRs are evaluated, in part, on the number and quality of leads they generate. IRs receive monetary incentives such as bonuses, trips and other awards based on their lead volume.

As an IR, Green produced a high lead volume. Green won several sales campaigns and trips, including one to Las Vegas. Green also won several awards for customer service.

However, Green was also disciplined several times. In July of 2000, Green's supervisor at the time,

Todd Kollman, placed him on corrective action for repeatedly violating the company's break policy. In January of 2001, Green's supervisor, Dawn Brewer, issued him a "Final Written Warning" for improperly taking credit for leads. Brewer wrote: "Such inappropriate coding of calls will not be permitted . . . .Improper coding, and ultimately receiving and taking credit for leads not transferred to the Investments department . . . is unacceptable." Brewer also stated: "This warning will remain in effect for the duration of your employment with Fidelity Investments." In June of 2003, Green's supervisor at the time, Andrew Ritter, issued him another Final Written Warning for providing confidential account information to a caller whose identity he did not verify. In August of 2004, Green's supervisor, Scot Herrmann, issued him a ninety-day warning for excessive trading errors. In March of 2005, Green was placed on probation for continued excessive trading errors.

In March of 2006, [Green's supervisor, Dina] Rulli attended a training session for team managers designed to improve employee

performance. Rulli and the managers listened to a call handled by Green and questioned whether he had taken credit for a lead without qualifying the customer. Rulli met with Green and played the call for him. Green admitted that he had not discussed the criteria required to enter and obtain credit for the lead.[1]

Rulli informed Green that she planned to review more of his calls, and she asked whether she would find other such calls. Green assured Rulli that she would not.

After meeting with Rulli, Green reviewed his notes from the call.

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[1] In his deposition, Green testified:

Q: And then you agreed with her in this meeting that you should not
have taken credit for a lead, correct?

A: I shouldn't have checked the box.

Q: And by checking the lead box, that was one of the leads that then goes
into your incentives statistics. Right?

A: Right. That would have gone there.

Green recalled that he had been told that the best way to communicate with the Income Planning department was through a lead. Green wanted to be sure that the proper person from the department contacted the customer. Green approached Rulli and told her that she could delete the lead from his total.

When Rulli reviewed a sampling of Green's calls from March 2006, she found that Green had falsified leads for at least six other calls during that month. Rulli did not speak to Green about these calls. Instead, Rulli sent an email to her supervisor, Mary Svitkovich, and a human resources representative, Heidi Fortune explaining that:

> It was discovered that Larry Green has been inappropriately submitting leads, therefore obtaining credit for work not performed. Leads were submitted for business partners in Annuities, PAS (Portfolio Advisory Services), and Income Planning in instances where these products and services were never discussed with clients. This behavior is a manipulation of the

> systems to receive credit for work that was not completed. This does have an impact on review scores, quarterly bonuses, and campaign awards. This is a clear violation of our policies and procedures.

Rulli, Fortune and Svitkovich agreed that Green should be terminated for violating Fidelity policy. On March 27, 2006, Rulli met with Green and informed him that his employment was being terminated because he inappropriately submitted a lead. Green was 52 years old at the time.

Under federal securities law, Fidelity was required to submit a Form U5 to NASD within thirty days of Green's termination. Form U5 requires Fidelity to explain why the individual's registration is being terminated, and then verify the accuracy and completeness of the information. Fidelity provided the following reason for terminating Green: "[E]mployee violated department procedures byrecording leads to business partners when he did not have the requisite substantive conversations with the customers."

> In his Amended Complaint, Green claims age discrimination under the Age Discrimination in Employment Act ("ADEA") and Ohio Revised Code§ 4112.02(A).[2] Green also brings claims of breach of implied contract, defamation, and interference with prospective employment under Ohio law.

Green v. Fidelity Invs., 2009 U.S. Dist. LEXIS 9949 at *1-*7 (S.D. Ohio Feb 11. 2009) (citations omitted).

II.

We review the district court's grant of summary judgment de novo. *Moses v. Providence Hosp. & Med. Ctrs., Inc.*, 561 F.3d 573, 578 (6th Cir. 2009). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no

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[2] The elements and burden of proof of an age-discrimination claim under Ohio law parallel an ADEA claim. *Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 785 (6th Cir. 2007); *seealso Conley v. U.S. Bank Nat'l Ass'n*, 211 F. App'x 402, 409 (6th Cir. 2006) (unpublished)("Because summary judgment is proper on [appellant's] ADEA claim, his claim under O.R.C.§ 4112.02 also fails.").

genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the burden of proving that there are no genuine issues of material fact." *Phillips v. Roane County, Tenn.*, 534 F.3d 531, 538 (6th Cir. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The non-moving party must then "come forward with 'specific facts showing a genuine issue for trial.'" *Merriweather v. Zamora*, 569 F.3d 307, 313 (6th Cir. 2009) (quoting Fed. R. Civ. P. 56(e)(2)). "When we review a motion for summary judgment, we must view all facts and inferences in the light most favorable to the non-moving party." *Hall v. Spencer County, Ky.*, 583 F.3d 930, 933 (6th Cir. 2009) (citing *Matsushita Elec.Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

A. Age-Discrimination Claim

Green contests the grant of summary judgment on his age-discrimination claim under the ADEA and the Ohio Revised Code.2 The ADEA forbids an employer to "fail or refuse to hire or to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). Green does not present direct evidence of age discrimination, but contends that he can make out a *prima facie* case based on circumstantial evidence. He presents as evidence his firing, despite being a "top performer"; the firing of another protected-age co-

worker, Debbie Collins, also for violating company policy;[3] the poor treatment of a third protected-age co-worker, Tamara O'Brien; and evidence that Rulli socialized more with younger employees.

This court applies the *McDonnell Douglas* burden-shifting framework to ADEA claims that rely on circumstantial evidence. *Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009). To set forth a *prima facie* case of age discrimination, a plaintiff must establish that he or she was: 1) a member of the protected class (i.e., at least forty years old); 2) subject to adverse employment action; 3) qualified for the position; and 4) replaced by someone outside the protected class or treated differently from a similarly-situated employee outside the protected class. *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 181 (6th Cir. 2004) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). "The plaintiff retains the ultimate burden of proving that 'age was the "but-for" cause of the employer's adverse action.'" *Harris v. Metro. Gov't of Nashville & Davidson County*, 594 F.3d 476, 485 (6th Cir. 2010) (citing *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351 (2009), and *Ky. Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008)).

[3] Green concedes that Collins was fired for violating company policy. Collins used a customer's password to access account information for the client who wanted information available on-line but was not near a computer. Green claims that Collins "could have been counseled" instead of being fired. Appellant's Brief at 32.

Green concedes that he cannot establish the fourth factor, as he was not replaced and can point to no similarly-situated non-protected employee treated better than he. Green argues, however, that the district court erred by rigidly applying the *McDonnell Douglas* test and that the court should have applied a more flexible standard. Specifically, Green claims that the test is inapplicable because Rulli had "no control over who joined the team"—and thus no inference could be drawn from the fact that he was not "replaced"—and because he "did not assert that there was a similarly situated younger person who was treated better," but rather "pointed to other circumstantial evidence of discrimination." Appellant's Brief at 31.

While it is true that the *McDonell Douglas* test should not be formalistically applied, *see, e.g.*, *Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 165-66 (6th Cir. 2004), this court routinely affirms the grant of summary judgment for failure to establish a *prima facie* case based on the *McDonnell Douglas* criteria. *See, e.g.*, *Balding-Margolis v. Cleveland Arcade*, No. 09-3017, 2009 WL 3735902, at *4 (6th Cir. Nov. 9, 2009) (unpublished) (affirming summary judgment on failure to present evidence of replacement by a younger worker or more favorable treatment of a similarly situated younger employee); *Johnson v. Interstate Brands Corp.*, No. 08-6387, 2009 WL3583397, at *3 (6th Cir. Nov. 3, 2009) (unpublished) (affirming summary judgment where younger comparison employee was not similarly

situated); *Gaffney v. Potter*, 345 F. App'x 991, 993 (6th Cir.2009) (unpublished) (finding a lack of a similarly situated non-protected employee fatal to both TitleVII and ADEA claims). The fact that Green cannot establish a *prima facie* case under the framework is not itself a sufficient reason to dispense with the test in favor of a more forgiving standard. Regardless, under any standard, Green's circumstantial evidence, consisting primarily of perceived social slights and his own subjective view that his performance made the decision otherwise irrational, do not suggest that his age was the "but-for" cause of his termination.[4]

B. Breach of Implied Contract

Green next argues that the district court erred when it granted summary judgment on his breach of implied contract claim. Green contends that he observed a practice at Fidelity of progressive discipline, which created an implied contract that he would only be fired for cause. This claim is without merit as no implied contract existed. As the district court noted, "not only did Green sign an agreement stating that his employment was at-will, but Fidelity's Corrective Action Policy expressly states that 'it does not create a contract of

[4] Because we find that Green did not establish a *prima facie* case of age discrimination, we need not reach the issue whether Fidelity's stated reason for his firing was pretextual.

employment' and that 'certain conduct may warrant immediate termination.'" *Green v. Fidelity Investments*, 2009 U.S. Dist. LEXIS 9949, at *16 (S.D. Ohio Feb 11, 2009) (citation omitted). Under Ohio law, "[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook." *Wing v. Anchor Media, Ltd.*, 570 N.E.2d 1095, 1098 (Ohio 1991) (citation omitted); *see also Smiddy v.Kinko's Inc.*, No. C-020222, 2003 WL 203576, at *5-*6 (Ohio App. Jan. 31, 2003) (unreported).Green does not contend that Fidelity engaged in fraud in the inducement and therefore summary judgment was appropriate.

C. Defamation

Green argues that Fidelity defamed him through both statements made on the Form U5 it submitted to NASD following his termination and statements made by his supervisor within the company. The district court addressed only the first claim. Upon firing Green, Fidelity was obligated to submit a Form U5 explaining the reason for his termination. The reason given was that Green "violated department procedures by recording leads to business partners when he did not have the requisite substantive conversations with the customers." R. 24, Ex. 2 at 1-2. Green does not contest the accuracy of this statement but rather

contends that it implies a dishonest motive. However, the statement makes no mention of any alleged motive and is substantively true. Ohio Revised Code § 2739.02 provides that truth "shall be a complete defense" to an action for defamation. *Accord Ed Schory & Sons, Inc. v. Soc. Nat'l Bank*, 662 N.E.2d 1074,1083-84 (Ohio 1996).

With regard to the statements made by Rulli, Green objects to an email she sent to Svitkovitch and Fortune, stating that Green had been "inappropriately submitting leads, therefore obtaining credit for work not performed," and that his actions were a "manipulation of systems to receive credit for work not performed."

These statements are protected by qualified privilege. *See Gaumont v. Emery Air FreightCorp.*, 572 N.E.2d 747, 755 (Ohio App. 1989) ("It is well established in Ohio that communications between an employer and an employee or between two employees concerning the conduct of a thirdor former employee made in good faith concerning a matter of common interest are within the doctrine of qualified privilege."). As such, they "are not actionable absent a showing of actual malice." *Matikas v. Univ. of Dayton*, 788 N.E.2d 1108, 1115 (Ohio App. 2003) (citation omitted). To demonstrate actual malice, Green would need to show that Rulli made the statements "with knowledge that [they] were false or with reckless disregard of whether they were false or not." *Daubenmire v. Sommers*, 805 N.E.2d 571, 587 (Ohio App. 2004) (citations omitted).

Green points to no evidence from which a rational trier of fact could find actual malice. Rather, Green concedes that he violated company policy, admitted as much to Rulli, and that the reporting violation improperly gave Green credit for the lead. To survive summary judgment, Green is required to do more than simply assert that the statements were made with malice. *Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008) ("In order to survive summary judgment, Plaintiff cannot rely on conjecture or conclusory accusations.").

D. Interference with Prospective Employment

Green's final claim is that the statements on the Form U5 interfered with his prospective employment. The Ohio Supreme Court has held that tortious interference with business relationships occurs "when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another." *A & B-Abell Elevator Co. v.Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995). Again, Green points to no probative evidence beyond his assertions that no one would hire him because of the statements made on the Form U5. "A plaintiff's conclusory allegations and subjective beliefs are not a sufficient basis to deny summary judgment." *Johnson v. Interstate Brands Corp.*, No. 08-6387, 2009 WL 3583397, at *5 (6th

Cir. Nov. 3, 2009) (unpublished) (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (1992)).

III.

Having found no error, we **AFFIRM**

Case No. 09-3247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
ORDER

LARRY GREEN

Plaintiff - Appellant

v.

FIDELITY INVESTMENTS

Defendant - Appellee

BEFORE: MARTIN and WHITE, Circuit Judges; ZOUHARY, U.S. District Judge.*

Upon consideration of the petition for rehearing filed by the Appellant, It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Issued:
May 25, 2010

s/ Leonard Green

Supreme Court, U.S.
FILED

10-336 AUG 23 2010

OFFICE OF THE CLERK
William K. Suter, Clerk

No. _____

In The
SUPREME COURT OF THE UNITED STATES

LARRY GREEN,
Petitioner

v.

FIDELITY INVESTMENTS,
Respondent

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Larry Green,

Plaintiff,

v. Case No. 1:07cv109

Fidelity Investments, Judge Michael R. Barrett

Defendant.

OPINION & ORDER

This matter is before the Court upon Defendant Fidelity Investment's Motion for Summary Judgment. (Doc. 24) Plaintiff Larry Green has filed a Response in Opposition (Doc. 39) and Defendant has filed a Reply. (Doc. 44)

I. BACKGROUND

On September 14, 1999, Plaintiff Larry Green began working for Defendant Fidelity Investments ("Fidelity") as a financial service representative. (Doc. 33, Larry Green Depo. at 47) At that time, Green signed an Employee Agreement acknowledging that his employment was at-will. (Id. Ex. 5) While employed at

Fidelity, Green became licensed by the National Association of Securities Dealers ("NASD"). (Id. at 51-52)

In May of 2005, Green transferred to Fidelity's Investments Department to work as an Investment Representative ("IR"). As an IR, Green answered calls from current and potential customers to assist them with their financial needs, and refer them to other Fidelity departments. (Id. at 101). Green was required to "qualify" potential customers to determine which Fidelity products and services were suitable. (Id. at 187-88) To properly qualify a caller, an IR must ask each caller a series of pre-determined questions. When an IR determines that a caller is qualified for a particular product or service, the IR marks a "lead" in the caller's account. (Id. at 189-90) A lead identifies the specific product or service for which a caller is qualified and may be interested. (Id. at 187-88) Based on the type of lead designated, a Fidelity business partner who specializes in that product or service will then contact the caller to provide additional information and attempt to complete the transaction. (Id. at 187-88) IRs are evaluated, in part, on the number and quality of leads they generate. (Id., Exs. 17-21) IRs receive monetary incentives such as bonuses, trips and other awards based on their lead volume. (Id. at 71, 197-97)

As an IR, Green produced a high lead volume. (Id. Ex. 17) Green won several sales campaigns and trips, including one to Las Vegas.

(Id., Exs 20, 21; Rulli Depo. 93, 96) Green also won several awards for customer service. (Doc. 39-2, Larry Green Decl., Ex. 1)

However, Green was also disciplined several times. In July of 2000, Green's supervisor at the time, Todd Kollman, placed him on corrective action for repeatedly violating the company's break policy. (Green Depo. at 63; Ex. 6) In January of 2001, Green's supervisor, Dawn Brewer, issued him a "Final Written Warning" for improperly taking credit for leads. Brewer wrote: "Such inappropriate coding of calls will not be permitted . . . .Improper coding, and ultimately receiving and taking credit for leads not transferred to the Investments department . . . is unacceptable." (Id. at 71; Ex. 8) Brewer also stated: "This warning will remain in effect for the duration of your employment with Fidelity Investments." (Id.) In June of 2003, Green's supervisor at the time, Andrew Ritter, issued him another Final Written Warning for providing confidential account information to a caller whose identity he did not verify. (Id., Ex 11) In August of 2004, Green's supervisor, Scot Herrmann, issued him a ninety-day warning for excessive trading errors. (Id. Ex. 14) In March of 2005, Green was placed on probation for continued excessive trading errors. (Id.)

In March of 2006, Rulli attended a training session for team managers designed to improve employee performance. (Doc 43, Dina Rulli Depo. at 111-13, 118) Rulli and the managers listened to a call handled by Green and questioned whether he

had taken credit for a lead without qualifying the customer. (Id. at 114-15)

Rulli met with Green and played the call for him. (Green Depo. at 214-15) Green admitted that he had not discussed the criteria required to enter and obtain credit for the lead. (Id. at 216)[1] Rulli informed Green that she planned to review more of his calls, and she asked whether she would find other such calls. (Id. at 218) Green assured Rulli that she would not. (Id.)

After meeting with Rulli, Green reviewed his notes from the call. (Id. at 219) Green recalled that he had been told that the best way to communicate with the Income Planning department was through a lead. (Id. at 223-24, 229-30) Green wanted to be sure that the proper person from the department

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[1] In his deposition, Green testified:

> Q. And then you agreed with her in this meeting that you should not have taken credit for a lead, correct?
>
> A: I shouldn't have checked the box.
>
> Q: And by checking the lead box, that was one of the leads that then goes into your incentives statistics. Right?
>
> A: Right. That would have gone there.

contacted the customer. (Id. at 230-31) Green approached Rulli and told her that she could delete the lead from his total. (Id. at 227, 235)

When Rulli reviewed a sampling of Green's calls from March 2006, she found that Green had falsified leads for at least six other calls during that month. Rulli did not speak to Green about these calls. Instead, Rulli sent an email to her supervisor, Mary Svitkovich, and a human resources representative, Heidi Fortune explaining that:

> It was discovered that Larry Green has been inappropriately submitting leads, therefore obtaining credit for work not performed. Leads were submitted for business partners in Annuities, PAS (Portfolio Advisory Services), and Income Planning in instances where these products and services were never discussed with clients. This behavior is a manipulation of the systems to receive credit for work that was not completed. This does have an impact on review scores, quarterly bonuses, and campaign awards. This is a clear violation of our policies and procedures.

(Svitkovich Depo. Ex. 1) Rulli, Fortune and Svitkovich agreed that Green should be terminated for violating Fidelity policy. (Rulli Depo. 145, 148) On March 27, 2006, Rulli met with Green and informed him that his employment was being terminated because he inappropriately submitted a lead. (Green Depo. at 237, 241; Rulli Depo. at 147-48) Green was 52 years old at the time.

Under federal securities law, Fidelity was required to submit a Form U5 to NASD within thirty days of Green's termination. (Doc 24, Ex. 1) Form U5 requires Fidelity to explain why the individual's registration is being terminated, and then verify the accuracy and completeness of the information. (Green Depo. Ex. 24) Fidelity provided the following reason for terminating Green: "[E]mployee violated department procedures by recording leads to business partners when he did not have the requisite substantive conversations with the customers." (Doc 24, Ex. 2)

In his Amended Complaint, Green claims age discrimination under the Age Discrimination in Employment Act ("ADEA") and Ohio Revised Code§ 4112.02(A). Green also brings claims of breach of implied contract, defamation, and interference with prospective employment under Ohio law.

II. ANALYSIS

A. Motion for Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of showing an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden of production, the non-moving party cannot rest on his pleadings, but must present significant probative evidence in support of his complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The mere existence of a scintilla of evidence to support the non-moving party's position will be insufficient; the evidence must be sufficient for a jury to reasonably find in favor of the non-moving party. *Id.* at 252.

Moreover, this Court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes v. Runyon*, 912 F.Supp. 280, 283 (S.D. Ohio 1995); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). The non-moving party must designate those portions of the record with enough specificity that

the Court can readily identify those facts upon which the non-moving party relies. *Karnes*, 912 F.Supp. at 283.

B. ADEA

The Age Discrimination in Employment Act ("ADEA") prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). The *McDonnell Douglas* burden-shifting framework for circumstantial-evidence cases has been applied in the context of claims brought under the ADEA. *Grosjean v. First Energy Corp.*,349 F.3d 332, 335 (6th Cir. 2003). In order to establish a *prima facie* case of age discrimination, a plaintiff must show that: (1) he or she is a member of the protected class, that is, he or she is at least forty years of age; (2) he or she was subjected to an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was treated differently from similarly situated employees outside the protected class. *Mitchell v. Vanderbilt University*, 389 F.3d 177, 181 (6th Cir. 2004). In this case, the parties only dispute whether Green has shown the fourth element.

Green does not point to a similarly situated employee, but instead argues that this Court should take a flexible approach to the *McDonnell Douglas* test. Specifically, Green argues that the

Court should find that he has satisfied the fourth element by showing that Rulli disfavored older workers. Green relies on the testimony of Debbie Collins, who was also fired by Rulli. (Rulli Depo. at 106) Collins explains that she took a call from a client who wanted information which was available on-line. (Doc. 39-2, Debbie Collins Decl. ¶7) Collins used the client's password to access the information, which was improper. (Id.) Collins admits that she had been given a warning in August of 2005, but could not believe she was being fired for helping a client. (Id.) Collins was forty-eight years old at the time of her termination. (Id., ¶ 2)

Green also cites to the testimony of Collins and Bill Harland, another employee who was sixty years old at the time, who state that Rulli did not want to be around the older employees and assigned the older employees to desks further away from her. (Collins Decl. ¶ 8-9; Doc. 30, William Harland Depo. at 6, 12) In his deposition, Green stated that at one social function, Rulli chose to sit with the younger employees. (Green Depo. at 170-72) Green also testified that Rulli spent more time coaching younger employees. (Id. at 160-61; 178-79)

The Sixth Circuit has recognized that there may be cases where there is so much circumstantial evidence of discriminatory animus that the plaintiff's failure to establish the fourth element is not fatal to a Title VII claim. *See Birch v. Cuyahoga County Probate Court*, 392 F.3d 151, 166 (6th Cir. 2004). The evidence must "tend to eliminate the

most common non-discriminatory reasons" for the adverse action and "raise an inference that the adverse action was motivated by discriminatory animus." *Id.* at 166-67.

In *Birch*, the plaintiff was employed as a probate court magistrate. *Id.* at 155. A study conducted of the magistrates' salaries showed that the average salary of the female probate court magistrates was lower than the average salary of the male magistrates. *Id.* at 155-56. The plaintiff, along with three other female magistrates, met with the presiding judge to discuss their concerns about their low salaries. *Id.* at 156. The judge stated that certain departments of the probate court had more responsibility and therefore justified higher salaries. *Id.* The judge also allegedly stated, "I don't know how I would make these salaries fair. I rely on the men to do the important work of the Court." *Id.* The plaintiff asked the judge whether he had a concern about her work, to which the judge replied that he did not "trust her work" and he "would prefer that [she] not work here." *Id.* When the plaintiff asked if she was fired, the judge responded no. *Id.* The judge also allegedly stated, "I don't have to hire women," and explained that if the female magistrates did not want to work at the court, they do not have to do so. *Id.*

The Sixth Circuit found that under Ohio law, this evidence was direct evidence of discrimination. *Id.* at 165. The court explained that the judge's statements "constitute highly probative evidence of

sexual bias by the individual most familiar with and responsible for setting the magistrate's salaries, a bias that he expressed in the context of [the plaintiff's] complaint about being underpaid." *Id.* The court found that "there was a direct correlation between [the judge's] sexual animus and his refusal to increase [the plaintiff's] pay." *Id.* The court went on to find that even if the evidence was not direct evidence of discrimination, the evidence was sufficient circumstantial evidence to satisfy the plaintiff's burden under *McDonnell Douglas*. *Id.* at 167.

The Court finds that the evidence presented by Green does not compare to the highly probative evidence of bias submitted by the plaintiff in *Birch*. *Accord Tribble v. Memphis City Schools*, 193 Fed. Appx. 401, 408 (6th Cir. Aug. 21, 2006) (unpublished) (finding that the plaintiff failed to offer evidence which is "analogous to the rampant hostility the Court considered in *Birch*.") Green has not presented any statements by Rulli which refer to the age of any employee or otherwise indicate a discriminatory animus based on age. Moreover, the evidence presented by Green does not "tend to eliminate the most common non-discriminatory reasons" for his termination or the firing of Collins. Both Green and Collins admitted that they had done what they had been accused of, and also recognized that they had previously been given warnings about their work. The Court notes that at the social function identified by Green, Rulli did not chose to sit with the younger employees, but

instead sat in the middle of the table and was then surrounded by the employees.[2] In addition, Green's own testimony contradicts the statements made by Collins and Harland that Rulli positioned her desk near those of the younger employees. Green testified that he did not know whether Rulli assigned him a desk or picked his own, but when Collins left, Green "just moved over to her desk." (Green Depo. at 138) Therefore, this evidence does not "raise an inference that the adverse action was motivated by discriminatory animus." Accordingly, the Court finds that Green has not presented sufficient evidence to support a *prima facie* case of age discrimination. Even if the Court were to find that Green has shown a *prima face* case, the Court finds that Green has not shown that Fidelity's articulated reason for his termination is pretextual. A plaintiff may prove pretext by showing either that: (1) the proffered reason had no basis in fact, (2) the proffered reason did not actually motivate the adverse action, or (3) the proffered reason was insufficient to motivate the adverse action. *Manzer*

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[2] In his deposition, Green testified as follows:
Q: Well, you said that she had placed herself away from you.
A: No. I said she went in and she sat down. We had a long table against the wall. And she went in and sat down at it, and all these guys came in and filled in around her. And then we sat down clear at the other end where there were three seats left.(Green Depo. at 172)

v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1084 (6th Cir. 1994). Green argues that Fidelity's reason is insufficient because even though he had been issued a final written warning in 2001, he had been counseled for performance issues at least three times after his warning and not been fired. The Court is unable to conclude that based on Fidelity's willingness to give Green multiple opportunities to "try again," Fidelity's reason for finally terminating him is pretext for discrimination. In the absence of any evidence of discriminatory animus in this case, the decision to terminate him could very well be based on a culmination of infractions–the proverbial "straw that broke the camel's back."

The Court is also not persuaded by Green's attempt to cast doubt on Fidelity's reason for his termination by arguing that there were no complaints about Green submitting leads which resulted in calls to clients or potential customers who were not interested in the products or services. There is no evidence in the record that there was any mechanism by which such complaints would be reported. Moreover, just because Green's practice of submitting leads without first qualifying the caller was not detected for a period of time does not mean that it did not occur or was acceptable.

The Court also rejects Green's argument that it was a departure from Fidelity's policy or practice to review calls which pre-dated his counseling or to not allow him to listen to the additional calls. There is nothing in the record which shows that Fidelity

had a policy in this regard or had treated other employees differently.

Finally, Green attempts to compare himself to Harland, who was not terminated for improperly submitting a lead. However, Harland, unlike Green, had never been disciplined. (Rulli Depo. at 83)

Based on the foregoing, the Court finds that Fidelity is entitled to summary judgment on Green's claim of discrimination under the ADEA.

C. Discrimination under Ohio law

This Court has found that cases interpreting the ADEA are applicable in the analysis of claims of age discrimination under Ohio law. *Williams v. General Elec. Co.*, 269 F.Supp.2d 958, 966 (S.D. Ohio 2003), *citing*, *City of Columbus Civil Serv. Comm'n v. McGlone*, 697 N.E.2d 204, 206-07 (Ohio 1998); *Cochran v. Columbia Gas of Ohio, Inc.*,742 N.E.2d 734, 738 (Ohio 2000). Accordingly, the Court finds that Fidelity is entitled to summary judgment on Green's claim of discrimination pursuant to Ohio Revised Code §4112.02(A).

D. Breach of implied contract

Green argues that a practice of progressive discipline and firing employees only for good cause is sufficient to create an implied contract to terminate for just cause. However, not only did Green sign an agreement stating that his

employment was at-will, but Fidelity's Corrective Action Policy expressly states that it "does not create a contract of employment" and that "certain conduct may warrant immediate termination." (Doc. 24-5)

In Ohio, "[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook." *Wing v. Anchor Media, Ltd. of Texas*, 570 N.E.2d 1095, 1098 (1991). Green has not shown any evidence of fraud in the inducement, and therefore he has not demonstrated that his claim should not be precluded by the disclaimer. *Accord Bickley v. FMC Technologies, Inc.*, 282 F.Supp.2d 631, 641 (N.D. Ohio 2003) (explaining that "even if defendant progressively disciplined three other employees, as plaintiff argues, this alone cannot create the existence of an implied contract-especially with the express contractual disclaimer and reservation of rights in the employee handbook."). Accordingly, Fidelity is entitled to summary judgment on Green's claim of breach of implied contract.

E. Defamation

Under Ohio law, defamation is a false publication that injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assn.*, 567 N.E.2d 253, 258 (Ohio 1991). Accordingly, a defendant can defend against a defamation action by showing that "the imputation

is substantially true, or as it is often put, to justify the 'gist,' the 'sting,' or the substantial truth of the defamation." *Nat'l Medic Srvs. Corp. v. E.W. Scripps Co.*, 573 N.E.2d 1148, 1150 (Ohio Ct. App. 1989). On the Form U5 submitted by Fidelity, the reason provided for Green's termination is: "[E]mployee violated department procedures by recording leads to business partners when he did not have the requisite substantive conversations with the customers." While Green may deny any dishonest motive in designating leads without qualifying the caller, he does not deny doing so, or that this was the basis for his termination. Therefore, Green has not shown the falsity of the statement, and Fidelity is entitled to summary judgment on Green's claim for defamation.

F. Interference with prospective employment

Under Ohio law, tortuous interference with business relationships occurs "when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *A & B-Abell Elevator Co. v. Columbus Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283, 1294 (Ohio 1995). Green claims that the negative comment on the Form U5 has interfered with potential employment. However, Green's only evidence is his own testimony that employers have

refused to hire him because of the statement on the Form U5. Green does not identify the prospective employers or provide any documentation that he was rejected for employment based on the statement by Fidelity. Without more, Fidelity is entitled to summary judgment on Green's claim of interference with prospective employment.

III. CONCLUSION

Based on the foregoing, Defendant Fidelity Investment's Motion for Summary Judgment (Doc. 24) is hereby **GRANTED**. This case shall be **CLOSED** and **TERMINATED** from the docket of this Court.

IT IS SO ORDERED.

/s/ Michael R. Barrett
Michael R. Barrett, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Larry Green,

Plaintiff,

v. Case No. 1:07cv109

Fidelity Investments, Judge Michael R. Barrett

Defendant.

JUDGMENT IN A CIVIL CASE

[ ] JURY VERDICT: This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered its verdict.

[X] DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Defendant's Motion for Summary Judgment (Doc.24) is **GRANTED.** This action is closed.

Date: February 11, 2009 James Bonini, Clerk
Clerk
By: *S/Barbara A. Crum*
Deputy Clerk

No. 10-336

In the Supreme Court of the United States

LARRY GREEN,

Petitioner,

v.

FIDELITY INVESTMENTS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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October 11, 2010

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly held that Petitioner failed to state a *prima facie* case of age discrimination.

2. Whether there is a circuit conflict over the fourth prong of the *McDonnell Douglas* test when the circuit courts' approach to this test is substantially the same.

3. Whether the Court should determine if *McDonnell Douglas* applies to the ADEA when Petitioner waived his right to raise this question.

RULE 29.6 STATEMENT

The parties to this proceeding are Petitioner Larry Green and Respondent Fidelity Investments. No parent or publicly held company owns more than 10% of Respondent's stock.

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Despite having presented no evidence to prove a *prima facie* case of age discrimination, Petitioner now asks this Court to grant review to decide whether the Sixth Circuit correctly applied the *McDonnell Douglas* test. For multiple reasons, the petition should be denied. First, Petitioner's failure to present any evidence of age bias supports the Sixth Circuit's decision that Petitioner failed to state even a *prima facie* case of age discrimination. Second, the Sixth Circuit's approach to the *prima facie* case component of the *McDonnell Douglas* test is not different than the approach taken by other circuits, so there is no circuit conflict on this issue. Third, by conceding the issue below, Petitioner waived his right to question whether *McDonnell Douglas* should apply to the ADEA.

STATEMENT OF THE CASE

A. Factual Background

As an investment representative for Fidelity Brokerage Services, LLC ("Fidelity"),[1] Petitioner answered inbound telephone calls from current and potential Fidelity customers. Pet. App. 2a. Petitioner was required to "qualify" each customer by asking a series of pre-determined questions. *Id.* at 2a-3a. Based on a customer's responses, Petitioner would mark a "lead" in the customer's account. *Id.*

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[1] "Fidelity Investments," named as the defendant in this action, is a servicemark and not a legal entity. Petitioner's legal employer was Fidelity Brokerage Services, LLC, on whose behalf this opposition is presented.

Fidelity evaluated Petitioner's performance, in part, according to the quantity and quality of leads he generated. *Id.* Petitioner could earn bonuses, trips and other awards based on his lead volume. *Id.* Although Petitioner earned several such awards for his high lead volume, Petitioner had a history of claiming leads he did not properly qualify, in violation of Fidelity policy. *Id.* at 4a. In January of 2001, Petitioner's supervisor issued him a "Final Written Warning" for inappropriately taking credit for leads. *Id.* The Final Written Warning stated: "Improper coding, and ultimately receiving and taking credit for leads not transferred to the Investments department ... is unacceptable ... This warning will remain in effect for the duration of your employment with Fidelity Investments."[2] *Id.*

In March of 2006, several Fidelity managers attended a training session to listen to recordings of employee-customer telephone conversations. *Id.* at 4a. The managers listened to a recording of one of Petitioner's calls. *Id.* at 5a. Although Petitioner had entered a "lead" for this particular call, the managers

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[2] Petitioner was disciplined several other times during the course of his employment at Fidelity. In July of 2000, Petitioner was placed on corrective action for repeatedly violating Fidelity's break policy. Pet. App. 3a-4a. In June of 2003, Petitioner's supervisor issued Petitioner a Final Written Warning for providing confidential account information to a caller without verifying the caller's identity. *Id.* at 4a. In August of 2004, Petitioner was issued a ninety-day warning by Dina Rulli for excessive trading errors. *Id.* In March of 2005, Petitioner was placed on probation by Rulli for excessive trading errors. *Id.* Thus it is not true, as Petitioner contends, that Rulli had not previously disciplined him: Petitioner was disciplined by Rulli twice before his termination of employment. Pet. App. 5.

noted that Petitioner had not properly qualified the customer. *Id.*

Following the training session, Dina Rulli, Petitioner's direct supervisor, met with Petitioner and played the call for him. *Id.* Petitioner admitted that he had not qualified the customer and that he should not have entered the lead or taken credit for the lead.[3] *Id.* Rulli stated that she intended to review more of Petitioner's calls and asked him whether she would discover additional inappropriately entered leads. *Id.* Petitioner stated that she would not. *Id.*

Rulli proceeded to review a sampling of Petitioner's telephone calls from March 2006. *Id.* at 6a. She discovered that Petitioner had falsified leads for at least six additional calls during that month. *Id.* Rulli brought these findings to the attention of her supervisor and a human resources representative. *Id.* They determined that Petitioner's employment should be terminated for violation of Fidelity policy. *Id.* at 7a.

B. The Trial Court's Decision

On February 12, 2007, Petitioner filed a complaint in the United States District Court for the Southern District of Ohio alleging age discrimination under the ADEA and Ohio state law. Petitioner also alleged state law claims for breach of implied contract, defamation, and interference with prospective

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[3] At his deposition, Petitioner again admitted that he improperly took credit for the lead. Pet. App. 5a. Therefore, Petitioner's contention that he "denied any inappropriate conduct" is inaccurate. *Id.* at 2.

employment. After full discovery, in which Petitioner was allowed to examine documents and take depositions, the district court granted Respondent's motion for summary judgment on all counts with a full-length opinion.

In his summary judgment papers, Petitioner admitted that he could not identify a younger employee who had been treated differently. Pet. App. 25a. Petitioner instead asked the court to take a "flexible approach" to the *prima facie* component of the *McDonnell Douglas* test and examine whether Petitioner "ha[d] satisfied the fourth element by showing that Rulli disfavored older workers." *Id.* at 26a.

Acknowledging that an alternative, flexible approach to this part of the *McDonnell Douglas* test had been recognized by the Sixth Circuit, the district court carefully analyzed Petitioner's evidence to determine whether it "raise[d] an inference that the adverse action was motivated by discriminatory animus." *Id.* at 26a-27a, quoting *Birch v. Cuyahoga Cnty. Probate Court*, 392 F.3d 151, 166 (6th Cir. 2004). The court found that Petitioner's arguments were not supported by his own sworn testimony or any other evidence and, therefore, failed to raise such an inference:

> Green has not presented any statements by Rulli which refer to the age of any employee or otherwise indicate a discriminatory animus based on age. Moreover, the evidence presented by Green does not "tend to eliminate the most common non-discriminatory reasons" for his termination or the firing of [Green's co-worker]

> Collins. Both Green and Collins admitted that they had done what they had been accused of, and also recognized that they had previously been given warnings about their work. The Court notes that at the social function identified by Green, Rulli did not chose to sit with the younger employees, but instead sat in the middle of the table and was then surrounded by the employees. In addition, Green's own testimony contradicts the statements made by Collins and [Green's co-worker] Harland that Rulli positioned her desk near those of the younger employees. Green testified that he did not know whether Rulli assigned him a desk or picked his own, but when Collins left, Green "just moved over to her desk." Therefore, this evidence does not "raise an inference that the adverse action was motivated by discriminatory animus." Accordingly, the Court finds that Green has not presented sufficient evidence to support a *prima facie* case of age discrimination.

Id. at 28a-29a (internal citations omitted).

C. The Appellate Court's Decision

Petitioner appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. Oral arguments were held on January 13, 2010. In an unpublished opinion filed March 15, 2010, a three judge panel unanimously affirmed the decision of the district court. On May 25, 2010, the panel denied Petitioner's petition for rehearing, without dissent.

REASONS FOR DENYING THE PETITION

A. Petitioner Failed to Establish a *Prima Facie* Case of Age Discrimination

The Sixth Circuit correctly found that Petitioner could not state a *prima facie* case of age discrimination under either the traditional formulation of *McDonnell Douglas* or under the more flexible standard set forth in *Birch v. Cuyahoga County Probate Court*, *supra*. The court expressly held that Petitioner could not establish a *prima facie* case "under any standard." Pet. App. 12a.[4]

The Court's holding in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009) confirms the Sixth Circuit's decision in this case. In *Gross*, the Court held that a plaintiff bringing a disparate treatment claim under the ADEA "must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision." *Id.* at 2351 (citation omitted). Here, because Petitioner's circumstantial evidence of age discrimination did not, "under any standard," suggest but-for causation, it was proper for the appellate court to affirm the dismissal of Petitioner's age discrimination claim.

There is no material issue of fact in this case that would preclude summary judgment for Respondent. *See Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986) ("In our view, the plain language of Rule 56(c)

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[4] The Sixth Circuit therefore did not need to reach the issue of pretext. Pet. App. 12a, n.4.

mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case..."). Petitioner, by his own admission, was not replaced by someone younger and was not treated differently than someone younger. Further, Petitioner presented no evidence of age bias. The Sixth Circuit characterized Petitioner's circumstantial evidence as "consisting primarily of perceived social slights and his own subjective view that his performance made the decision otherwise irrational." Pet. App. 12a. Lastly, Petitioner admitted, under oath, to the commission of serious misconduct involving personal dishonesty for which his employment was terminated after several warnings.

The Sixth Circuit therefore correctly concluded that Petitioner could not, "under any standard," state a *prima facie* case of age discrimination.

B. There is No Conflict Among the Circuits Regarding the Proof Necessary to Meet the Fourth Prong of the *McDonnell Douglas* Test

There is no circuit conflict over the fourth prong of the *McDonnell Douglas* test. Like the First, Second and Seventh Circuits, the Sixth Circuit recognizes a flexible standard of proof which allows a plaintiff to state a *prima facie* case by offering evidence adequate to create an inference of discrimination:

> It does not follow, however, that the plaintiff necessarily must submit such comparative evidence in order to establish a *prima facie* case.

> The Supreme Court has explained that "[t]he facts necessarily will vary in [discrimination] cases, and the specification ... of the *prima facie* proof required ... is not necessarily applicable in every respect to different factual situations." Thus, for example, there may be cases where there is so much evidence of a decision-maker's discriminatory animus that a plaintiff's failure to satisfy the fourth element of the *McDonnell Douglas prima facie* case is not fatal to her claim.

Birch, 392 F.3d at 166 (internal citations omitted).

Accordingly, the Sixth Circuit's approach to the fourth prong of *McDonnell Douglas* is consistent with the Court's directive in *International Brotherhood of Teamsters v. United States*, 97 S.Ct. 1843, 1866 (1977) ("The importance of *McDonnell Douglas* lies ... in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.").

The cases cited by Petitioner to demonstrate the supposed circuit split state virtually the same standard as the Sixth Circuit in *Birch*. *See Rivera Aponte v. Rest. Metropol No. 3, Inc.*, 338 F.3d 9, 11 (1st Cir. 2003) ("The fourth element requires the plaintiff to produce 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.'") (citation omitted); *Terry v. Ashcroft*, 336 F.3d 128, 138 (2nd Cir. 2003) ("a claimant must demonstrate that ... the adverse action occurred under 'circumstances giving rise to an inference of

discrimination.'") (citation omitted); *Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1090 (7th Cir. 2000) (plaintiff must show that employer "hired someone else who was substantially younger or other such evidence that indicates that it is more likely than not that his age or disability was the reason for the discharge.") (citation omitted). The courts may use slightly different words, but the standard is the same; there must be some evidence that age was the reason for the employer's decision.

The opinions of the courts below further show that there is no circuit conflict on this subject. Both the district court and the appellate court considered whether Petitioner could state a *prima facie* case under the flexible standard of *Birch*. They found that Petitioner could not. The district court, after carefully evaluating all of Petitioner's evidence, determined that the evidence did not "raise an inference that the adverse action was motivated by discriminatory animus." Pet. App. 29a. Likewise, the appellate court concluded that "under any standard" (*i.e.*, under either the traditional standard or the "more flexible" standard), Petitioner could not state a *prima facie* case of age discrimination.[5]

Accordingly, there is no circuit conflict and, therefore, no reason for the writ to be granted.

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[5] The Sixth Circuit's conclusion that Petitioner's evidence does "not suggest that his age was the 'but-for' cause of his termination" is substantially the same as concluding that it does not "raise an inference that the adverse action was motivated by discriminatory animus."

C. Petitioner Waived His Right to Question Whether *McDonnell Douglas* may be Applied to ADEA Claims

Petitioner waived his right to question whether *McDonnell Douglas* applies to the ADEA because he did not raise this question in the proceedings below. This Court is the first forum in which Petitioner has raised the question. The issue was not addressed below by the district court or the Sixth Circuit because Petitioner and Respondent treated the issue as if it were settled law in their respective briefs and at oral argument.

The Court has analyzed ADEA claims under *McDonnell Douglas* when litigants did not dispute its application to their cases. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2105 (2000) ("Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here."); *O'Connor v. Consol. Coin Caterers Corp.*, 116 S.Ct. 1307, 1310 (1996) ("We have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.").

The Court's recent decision in *Gross v. FBL Financial Services, Inc.*, *supra*, has not caused confusion among the lower courts. Since *Gross*, the circuit courts have continued to apply *McDonnell Douglas* to age discrimination claims. *See, Geiger v. Tower Auto.*, 579 F.3d 614, 622 (6th Cir. 2009); *Jones v. Okla. City Pub. Sch.*, No. 09-6108, 2010 WL 3310226, *4-5 (10th Cir. 2010) (not yet final); *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378 (5th Cir.

2010); *Gorzynski v. Jetblue Airways Corp.*, 596 F.3d 93, 106 (2d Cir. 2010); *Smith v. City of Allentown*, 589 F.3d 684, 690-91 (3d Cir. 2009); *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 447 n.2 (1st Cir. 2009); *Martino v. MCI Commc'ns Servs., Inc.*, 574 F.3d 447, 452 (7th Cir. 2009); *Bodkin v. Town of Strasburg*, No. 09-2167, 2010 WL 2640461, *2 (4th Cir. 2010) (unpublished).

Even if the Court is inclined to further elaborate upon the question presented, this case is an unsuitable candidate for resolving the issue. The record evidence shows that Respondent terminated Petitioner's employment for serious violations of workplace policy, including workplace dishonesty. Petitioner admitted under oath to the conduct for which his employment was terminated. Pet. App. 5a. Petitioner's arguments are not supported by his own sworn testimony or any other evidence in the record. Contrary to Petitioner's statement, the record is *not* "full of" undisputed facts demonstrating age bias. *Id.* at 5. The record is void of any such evidence. The Court's intervention is not required in this case.

D. The Decision Below is Correct

Respondent terminated Petitioner's employment due to acts of workplace dishonesty. Petitioner falsified at least seven leads in March of 2006 alone. Pet. App. 6a. Petitioner admitted under oath to inappropriately claiming at least one lead. *Id.* at 5a. He engaged in this misconduct even after previously receiving a Final Written Warning for the very same behavior. *Id.* at 4a.

At every turn the courts below rejected Petitioner's tenuous arguments of bias. There is no evidence that age was a factor in Respondent's decision to terminate Petitioner's employment, much less that age was the but-for factor. The appellate court correctly concluded that "under any standard" Petitioner's age discrimination claim would fail.

There are no issues of material fact which preclude summary judgment. The Sixth Circuit's decision affirming summary judgment for Respondent is correct and raises no issue worthy of this Court's review under Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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